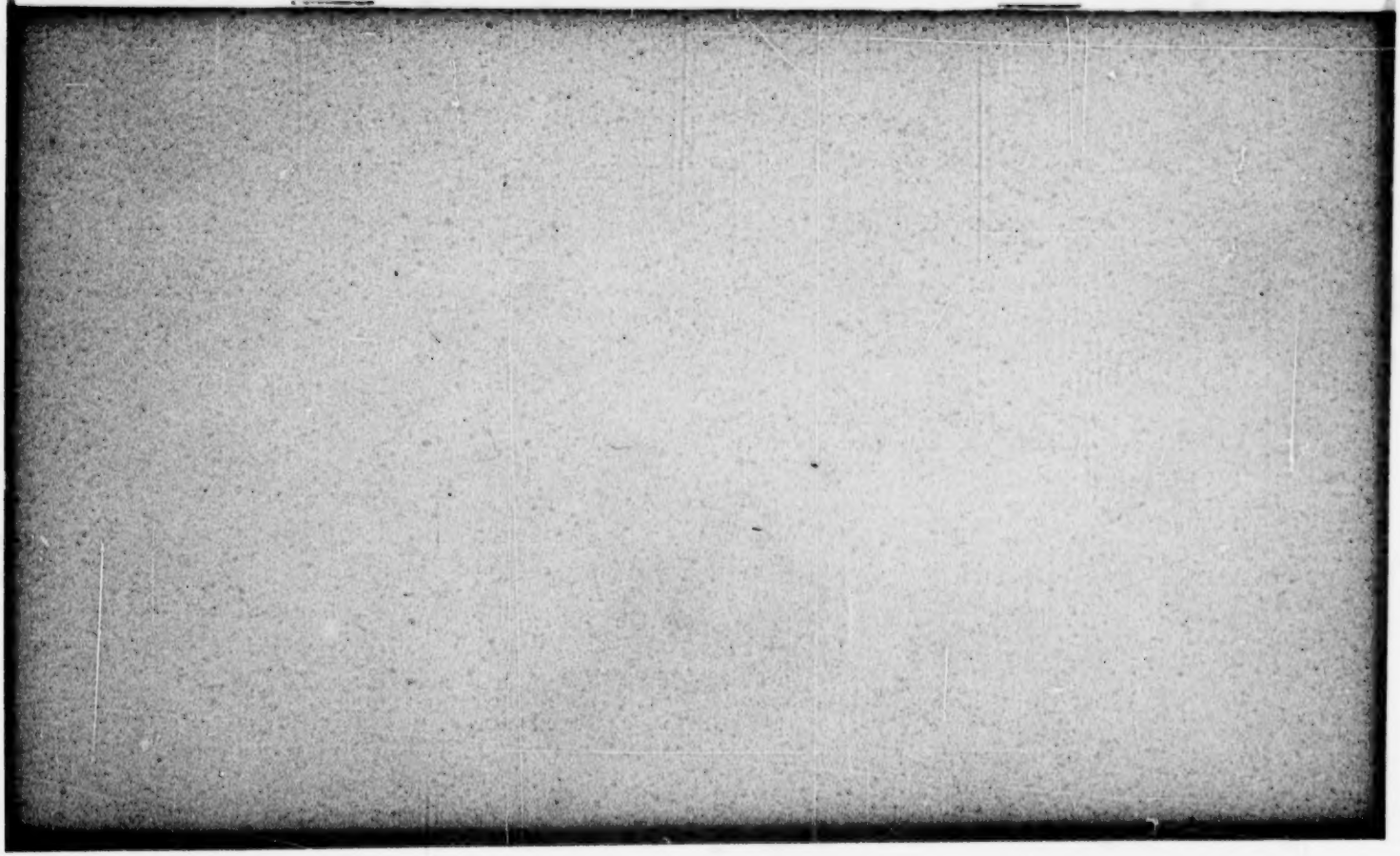

SUPREME COURT, U. S.

FILED

JUL 1 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

_____ Term, 197_

NO. 73-1678

GEORGE P. DONALDSON, JR.,
Petitioner,

vs.

CITY COUNCIL, CITY OF PLANTATION, FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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MIAMI REVIEW — 371-4853 — 377-3721

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Respondent prays that the Petition for Certiorari be denied.

First, the case involves much ado about nothing — a *15 day suspension* of a contractor's license — not a matter of sufficient concern to warrant consideration by the Supreme Court of the United States.

Second, The Petition for Writ of Certiorari violates Supreme Court Rule 23, Paragraph 4, because the Petition is unclear, as follows:

(1) The Petition fails to include captions of judgments in the Appendix[1] (App. 57, 58) as required by Rule 23, Paragraph 1(j);

(2) The Petition fails to include captions of other documents (App. 3, 9, 19, 50, 54);

(3) The Petition commences a quotation from the City's Ordinances in the middle (App. 59);

(4) The Petition fails to clarify the Constitution of the State of Florida to which it is referring[2] (Petition, p. 6, Par. 2) by failing to set forth the pertinent text under "Constitutional Provisions Involved" or in the Appendix, as required by Supreme Court Rule 23, Par. 1(d);

(5) The Petition states that the right of cross examination and to confront the accuser was denied (Petition p. 2, Par. 4; p. 7, Par. 4) when the Petitioner's Appendix clearly shows the right to cross examination was granted. (Direct App. 71-76; Cross App. 76-90);

(6) The Petition states that the right of appeal was denied (Petition, p. 2, Par. 4) when the Appendix clearly shows the right of appeal and certiorari was granted by the State Courts at least twice and the case has been con-

[1]Citations to the Appendix "App." refer to the Appendix to Petitioner's Petition for Certiorari.

[2]During the five years this case was pending, the Constitution of the State of Florida was revised, effective January 1, 1973.

sidered at every state court level at least once and by some numbers of time. (See Opinions Below, *infra.*)

(7) The Petition's system of citing to the Appendix is confusing and contains omissions (Petition, p. 2, Par. 1)[3] and the Appendix contains a number of documents from the lower courts in an illogical order;

(8) The Petition fails to comply with Supreme Court Rule 23, Paragraph 1(f) by failing to specify the *stage* in the proceedings in the Court of first instance and in the Appellate Court at which and the *manner in which* the federal questions sought to be reviewed were raised.

(a) The Petition does not mention raising the federal question of failure to allow cross examination or appeal at the trial level before the City Council, or include portions of the record raising same as a federal right.

(b) The Petition does not mention raising the federal question of failure to allow cross examination or right of appeal before the Municipal Court, on Petitioner's appeal thereto, or include portions of the record raising same as a federal right.

(c) The Petition fails to specify or include portions of the record where the federal question was allegedly raised and ruled on by the Circuit Court or to state the method of raising same before the Circuit Court.

(d) The Petition shows that the Assignments of Error to the Fourth District Court of Appeals (App. 19) relied upon to raise a federal question, merely stated

[3] ". . . Appendix DPX? (Municipal Court) . . ."

". . . denied due process of law . . ."

which is insufficient to raise a federal question as the Florida Constitution also contains a "due process clause." If the State Constitution has a due process clause, a claim that due process has been violated will be deemed to relate to that clause. *Bowe v. Scott*, 233 U.S. 658, 664-5 (1914). Further, the Assignments of Error fail to specify what ruling below denied due process.

(e) The Petition incorrectly states that the Petition for Certiorari to the Supreme Court of the State of Florida asserted constitutional grounds of due process and equal protection and denial of Petitioner's right of Appeal and others (Petition p. 6, Par. 2). However, the Petition for Certiorari to the Supreme Court of Florida itself included in the Appendix (App. 9-15) fails to allege violation of said federal constitutional provisions or mention due process or equal protection.

(f) The Petition does not mention the Petition for Rehearing in the Florida Supreme Court. However, the Petition for Rehearing in the Florida Supreme Court (App. 3-6) shows that it finally raised the question of right of cross examination, denial of due process, and denial of right of appeal and cited the State Constitution; but Petitioner again failed to raise a federal question or claim rights under the Federal Constitution.

(9) The Petition contains a labyrinth of *non sequiturs* not substantiated by its Appendix.

OPINIONS BELOW

The opinions below were not reported. Copies of the opinions below are included in Petitioner's Appendix as follows:

(1) *Evidentiary Hearing:*

February 3, 1969 — The City Council hearing decision, after 9 days of hearing, suspended the certificate of competency of contractor, George Donaldson, Jr., for 15 days (App. 27-32).

(2) *Appeal:*

October 7, 1970 — The Municipal Court, on Appeal by Petitioner, affirmed the City Council's Decision. (App. 33-41).

(3) *District Court of Appeals:*

December 16, 1970 — The District Court of Appeals quashed the appeal filed by Petitioner from Municipal Court. (App. 42).

December 16, 1970 — The District Court of Appeals dismissed the Petition for Certiorari of Petitioner. (App. 43).

(4) *Circuit Court:*

February 4, 1971 — The Circuit Court quashed the appeal of Petitioner, determining that it had no jurisdiction. (App. 44-45)

March 24, 1971 — Rehearing denied. (App. 46).

February 8, 1973 — The Circuit Court, on certiorari, determined it had jurisdiction, considered the record and denied Petition for Certiorari filed by Petitioner. (App. 47).

(5) *District Court:*

April 17, 1973 — The District Court of Appeals dismissed the Appeal filed by Petitioner from Circuit Court. (App. 49).

May 23, 1973 — The District Court, on rehearing, vacated the dismissal. The Motion to Dismiss was heard. (App. 57).

June 25, 1973 — The District Court dismissed the Appeal. (App. 58)

(6) *Supreme Court:*

October 11, 1973 — Petition for Certiorari by Petitioner was denied as the Court considered itself to be without jurisdiction. (App. 7)

January 10, 1974 — The Petition for Rehearing was denied. (Appendix A)

JURISDICTION

This Court lacks jurisdiction of this cause because:

(1) It does not involve a substantial federal question.

(2) The question now presented was not properly presented and preserved in the Courts below.

(3) The judgment of the State Court rests on independent non-federal state grounds, adequate to support it.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES WHICH THE CASE INVOLVES

The Petitioner states that he received no appeal because the Municipal Court had no appellate jurisdiction (Petition, p. 5, Footnote 3); but the Petition fails to set out *verbatim* or cite the volume and page of the official edition to the applicable law from which it draws the conclusion that the Municipal Court had no appellate jurisdiction. In fact, the Appendix (App. 54) cites and quotes the City Code of Ordinances granting the Municipal Court appellate jurisdiction, set forth below.

This case involves the following provisions of the Florida constitution and municipal ordinances.

A. FLA. CONST., art. V, §1 (1956)

> "The judicial power of the State of Florida is vested in a *supreme court, district courts of appeal, circuit courts*, Court of Record of Escambia County, Criminal Courts of Record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including *municipal courts* or *commissions*, as the legislature may from time to time ordain and establish." [Emphasis added]
> (Revised Jan. 1, 1973)

B. PLANTATION, FLA., CODE §§ 6-34, 6-35, 6-36 and 6-37[4]

Note particularly, the following:

1. 6-34(H)(1)—"The city council of the City of Plantation shall have jurisdiction over all matters pertaining to the qualification and disciplinary action of any building contractor . . ."

2. 6-34(H)(7)(d)(3) c—"Each party shall have these rights: To call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him."

3. 6-34(H)(7)(e)—"An appeal from the decision of the board may be made by the contractor involved to the municipal court within twenty (20) days, but not thereafter."

C. Due Process Clause of Florida Constitution

1. FLA. CONST., Declaration of Rights §12 (1944)—"No person shall be . . . nor be deprived of life, liberty or property without due process of law."

2. FLA. CONST., art. I, §9—"No person shall be deprived of life, liberty or property without due process of law." (Adopted 1968)

[4]See Petitioner's Appendix (App. 59-71).

D. Appeals

1. 1968 Version of Florida Constitution

a. FLA. CONST., art. V, §4(2) (1965)—"JURISDICTION. Appeals from trial courts *may* be taken *directly* to the *supreme court*, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or *construing a controlling provision of the Florida or federal constitution*, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness."

b. FLA. CONST., art. V, §5(3) (1965)P"JURISDICTION. Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees *except those from which appeals may be taken direct to the supreme court or to a circuit court.*"

2. 1973 Revision of Florida Constitution

a. FLA. CONST., art. V §3(b)—"JURISDICTION.—The *supreme court:* (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or *construing a provision* of the state or *federal constitution.*"

b. FLA. CONST., art. V, §4(b)—"JURISDICTION.—(1) *District courts of appeal* shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, *not directly appealable to the supreme court* or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court."

QUESTIONS PRESENTED

Was the Petitioner, in fact, denied

(1) The right to cross examine and confront his accuser, or

(2) The right of appeal?

Was any such denial properly raised and preserved as a violation of a federal right?

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially accepted by respondent, but not *verbatim*. In the interest of brevity, the major points of correction are listed below; however, respondent does not intend to be limited thereto by omission of others:

(1) Respondent denies any federal question was properly raised in any lower Court.

(2) The trial extended over nine days and at least

ten witnesses were presented as to violations by Petitioner of the Building Code and City Ordinance. Petitioner was allowed to adequately cross examine and confront all witnesses including C. Douglas Rice.

(3) Petitioner was granted a right of Appeal.

ARGUMENT

I. THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

A. It is settled that a state may consistently with the Federal Constitution regulate the profession of general contractors to assure said contractors adhere to the Building Code in order to safeguard the public health and safety.

Nor does the Federal Constitution impose any barrier to the State's delegating to a municipality the authority to prescribe detailed regulations for examination and discipline of general contractors to assure as to their competency to practice their profession in the interest of safeguarding the public health and safety.

Petitioners do not contend such was improper.

B. Petitioner theorizes that the procedures followed by the Council in ruling on objections, in effect, denied the right of cross examination and therefore denied due process. This contention, even if it had been properly preserved, is so lacking in substance as to be frivolous. A review of the Excerpts included in the Appendix to Peti-

tioner's Brief clearly shows the objections were properly ruled upon. However, assuming Petitioner were correct, the way a hearing officer ruled in a particular case, where the right to cross examine is clearly set forth in the City's Ordinances and the right to cross examine was clearly permitted, can hardly be said to raise a substantial federal question.

Federal Courts need not require uniformity with respect to admission of evidence, conduct of counsel, conflicts of personality between judge and counsel, to meet due process, *Pennington v. Stynchcombe*, 428 F.2d 875 (5th Cir. 1970).

C. The Petitioner further states he was denied the right to appeal.

Petitioner's complaint about the appellate procedures of the state courts does not raise a federal question.

> "Without any doubt it rests with each state to prescribe the *jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise;* and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *John v. Paullin*, 231 U.S. 583, 585. See also *Wolfe v. North Carolina*, 364 U.S. 177, 195; *C.I.O. v. McAdory*, 325 U.S. 472, 477; *Parker v. Illinois*, 333 U.S. 571; *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190; *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191; *Harding v. Illinois*,

196 U.S. 78." Stern and Gressman, SUPREME COURT PRACTICE, p. 123, Sec. 3.27, 4th Ed. (1969). [Emphasis added][5]

Further, Petitioner was not denied an appeal by State Court appellate procedures. On appeal from the City Council, Petitioner had a choice —

(1) to appeal to the Municipal Court pursuant to City Ordinance Section 6-34 (H) (7) (e), or

(2) if a federal constitutional question existed, to appeal directly to the Supreme Court of the State of Florida. The Constitution of the State of Florida stated the following from 1965 through 1972:

> "Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only . . . from final judgments or decrees . . . construing a controlling provision of the Florida Federal Constitution." FLA. CONST., art. V, §5(3) (1965).

He chose the first (1).

Therefore, no substantial federal question exists.

II. THE QUESTION NOW PRESENTED WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE COURT BELOW.

A. The Petition for Writ of Certiorari fails to include any portion of the State Court record showing Petitioner raised in the State Courts a violation of the

[5]Emphasis added throughout the remainder of this Brief has been added by Respondent.

Federal Constitution by denying the right of cross examination. At most, he claimed a lack of "due process."

> ". . . [W]hile there is no precise method for raising a federal question, there are certain requirements of *particularity* which must be met however the question is raised. As stated in Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from *mere inference*, but only from *averments* so *distinct* and *positive* as to place it beyond question that the party bringing a case here from such court *intended to assert a Federal right.*
>
> "Thus, care must be taken *to make reference to the particular clause of the federal constitution* . . . The Supreme Court in the past has held insufficient a mere reference to . . . the due process of law." Stern and Gressman, SUPREME COURT PRACTICE, p. 117, Sec. 3.26, 4th Ed. (1969) citing *Bowe v. Scott*, 233 U.S. 658, 664-5 (1914).

If the State Constitution has a due process clause, a claim of violation of due process is deemed to relate to that clause. *Bowe Case, supra.* The Due Process clause in the Florida Constitution was set forth above.

B. The Petitioner failed to follow the appellate channels provided by the State for review of a federal constitutional issue.

The Constitution of the State of Florida provided the following from 1965 through 1972:

"Appeals from trial courts *may* be taken directly to the Supreme Court as a matter of right, only . . . from final judgments or decrees . . . *construing* a *controlling provision of the* state or federal *constitution.*" FLA. CONST., art. V, §5(3) (1965)

The 1973 Revision, effective January 1, 1973, stated:

"The Supreme Court:
(1) *Shall* hear appeals from final judgments of trial courts . . . *construing a provision of the* state or *federal constitution.*" FLA. CONST., art. V, §3(b)

In 1969, the Petitioner, if he deemed himself denied the right of cross examination under the state or federal constitution should have appealed direct to the Supreme Court from the City Council's decision. (Also see FLA. CONST., art. V, §5(3) *supra.*) This he did not do.

But accepting for argument Petitioner's contention that the Circuit Court was the "trial court", in 1973, to raise a federal constitutional issue, the Petitioner was *required* to appeal from the Circuit Court direct to the Supreme Court. In 1973, the Petitioner waived the federal constitutional issue and appealed from the Circuit Court to the District Court of Appeal.

"*Failure to follow the appellate channels provided by the State is usually fatal to the chances for* [*United States*] *Supreme Court review. The litigant . . . waived the federal issue and there will*

be no basis for the assertion of the Court's jurisdiction. Herndon v. Georgia, 295 U.S. 441, 443; *Beaty v. Richardson,* 276 U.S. 599. *Thus a waiver will be implied if the litigant fails to obey a state rule of procedure providing that federal constitutional issues raised in the trial court must be reviewed, if at all, directly by the state supreme court and that any attempt to secure review in an intermediate appellate tribunal precludes the state supreme court from considering the federal issues. Parker v. Illinois* [333 U.S. 571]; *Central Union Tel. Co. v. Edwardsville,* [269 U.S. 190]" Stern and Gressman, SUPREME COURT PRACTICE, P. 123, Sec. 3.27, 4th Ed. (1969)

III. THE JUDGMENT OF THE STATE COURT RESTS ON INDEPENDENT NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

A. The only point raised by the Petition for Writ of Certiorari in regard to denial of cross examination was the ruling on objections of two witnesses during testimony of C. Douglas Rice (App. 71-90) and Antonia Hubert (App. 92-100). However, the decision of the Municipal Court clearly points out that these two witnesses only testified regarding use by the contractor of unlicensed subcontractors. (App. 36, Par. 2). There were two other grounds for the suspension — failure to provide competent supervision and regularly failing inspections by the Building Department on which more than nine other witnesses

testified. The Municipal Court found said testimony to be substantial evidence to support the conclusion. (App. 35)

B. The Supreme Court's determination not to hear the case is apparently based upon its conclusion that Petitioner was not denied the right to appeal; but merely that Petitioner of his own volition, appealed to the wrong court —an independent state ground. In this regard note the Petitioner allegedly " . . . in an abundance of caution . . ." (Petition, p. 4, Par. 2) requested four different kinds of review of the Municipal Court decision—appeal and certiorari to the Circuit Court, appeal and certiorari to the District Court of Appeals—indicating his confusion. Later, he again appealed from the Circuit Court to the District Court.[6] If he desired to raise a federal constitutional issue, he should have appealed direct to the Supreme Court, which he did not do, waiving the federal constitutional question.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

---

[6]Contrary to Petitioner's statement (App. 12, Par. 1), Petitioner did not have an appeal to the District Court from the Circuit Court under Article V, § 5, if the case was appealable on a federal constitutional issue to the Supreme Court. See FLA. CONST., art. V, §5(3) (1965); FLA. CONST., art. V, §4(b).

State v. Furen, 118 So.2d 6 (Fla. 1960) cited by Petitioner (App. 13-24) in his Petition for Rehearing in the Florida Supreme Court is clearly distinguishable as (1) in the *Furen* case, a statute provided for appeal to the Circuit Court, while in the case at bar, an ordinance provided for appeal to the Municipal Court; (2) *Furen* involved appeal from an order of an administrative *agency* to Circuit Court while this case involved review of a decision of the Municipal *Court* to the Circuit Court.

CERTIFICATE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to the Petition for Certiorari was delivered by mail to JAMES D. LITTLE and ANDREW C. HALL, 12th Floor, Concord Building, Miami, Florida, 33130, and FRATES, FLOYD, PEARSON, STEWART, PROENZA and RICHMAN, P.A., 12th Floor, Concord Building, Miami, Florida, 33130, Attorneys for Petitioner, this ____ day of _____, 1974.

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